Re Wah Hai Hing; ex p Choong Wai Wah & Anor

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO 29–3434 OF 1997
CHIN FOOK YEN J
27 APRIL 1999

Bankruptcy *— Notice — Whether can be issued in two names — Whether amount claimed notice must include costs to be taxed and interest — Bankruptcy Act 1967 s 3(1)(i) — Interpretation Acts 1948 and 1967 s 4(3)*

The two applicants, as plaintiffs, were awarded damages against the debtor which were subsequently assessed at RM19,479.14 and costs to be taxed in favour of the applicants in both their names. The deputy registrar granted a receiving order and adjudicating order against the debtor on a petition in the names of the applicants. The debtor appealed, based on two grounds, ie that: (i) the bankruptcy notice dated 12 December 1997 was fatally flawed, in that it was issued in both the applicants' names; and (ii) the amount claimed in the bankruptcy notice did not include the costs to be taxed, as well as the interest to which every judgment was entitled to carry pursuant to O 42 r 12 of the Rules of the High Court 1980.

Held, dismissing the appeal with costs:

(1) Although s 3(1)(i) of the Bankruptcy Act 1967 ('the Act') mentions the words 'a creditor' in singular number, s 4(3) of the Interpretation Acts 1948 and 1967 ('the Interpretation Acts') clearly provides that 'words and expressions in the singular include the plural, ...'. In the instant case, since the applicants' registered interest in the land was undivided, it will be an absurdity to exclude the application of s 4(3) of the Interpretation Acts that the singular would include the plural (see p****); *Michael Chong Ngian Fong v Syarikat Fong Sam Timber & Anor* [1977] 1 MLJ 263 not followed; and *Re Frank Hill; ex p Holt & Co* [1921] 2 KB 831 followed. Therefore, the bankruptcy notice issued in the instant case in both the applicants' names is valid and the petition presented to that extent is also valid (see p 654 D–E).

(2) In the instant case, there was a 'final judgment' within the meaning of s 3(1)(i) of the Act. There is no decision that a bankruptcy notice cannot be issued for a judgment debt simply because the judgment includes also costs to be taxed, and the costs have not been taxed. Therefore, the question of waiver in respect of the costs in a claim for judgment debt does not arise (see p****); *Re GJ; ex p GJ* [1905] 2 KB 678; *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 and *Re Farrugia, ex p Deputy Commissioner of Taxation* (1988) 80 ALR 651 followed (see p 656D–G).

[Bahasa Malaysia summary

Kedua-dua pemohon, sebagai plaintif telah diaward ganti rugi terhadap penghutang yang kemudian ditaksirkan pada RM19,479.14 dan kos untuk ditetapkan kepada pemohon-pemohon dalam nama mereka berdua. Timbalan pendaftar telah memberikan perintah penerimaan dan perintah penghukuman terhadap penghutang di atas petisyen di dalam nama pemohon-pemohon. Penghutang telah merayu, berdasarkan dua alasan, iaitu bahawa; (i) notis kebankrapan bertarikh 12 Disember 1997 mempunyai kesilapan memudaratkan, di mana ia telah dikeluarkan di dalam nama kedua-dua pemohon; dan (ii) jumlah tersebut yang dituntut di dalam notis kebangkrapan tidak termasuk kos untuk ditetapkan, dan juga faedah yang berhak dimasukkan di dalam setiap penghakiman menurut A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan, menolak rayuan dengan kos:

(1) Walaupun s 3(1)(i) Akta Kebankrapan 1967 ('Akta tersebut') menyatakan perkataan 'pemiutang' di dalam bentuk tunggal, s 4(3) Akta Tafsiran 1948 dan 1967 ('Akta Tafsiran tersebut') dengan jelas memperuntukkan bahawa 'perkataan-perkataan dan ungkapan-ungkapan dalam bilangan tunggal meliputi bilangan jamak, ...'. Di dalam kes ini, oleh kerana kepentingan berdaftar pemohon di dalam tanah tersebut adalah tidak dibahagi, tidak dapat diterima akal untuk mengecualikan pemakaian s 4(3) Akta Tafsiran tersebut bahawa yang tunggal akan meliputi bilangan jamak (lihat ms*****); *Michael Chong Ngian Fong v Syarikat Fong Sam Timber & Anor* [1977] 1 MLJ 263 tidak diikut; dan *Re Frank Hill; ex p Holt & Co* [1921] 2 KB 831 diikut. Oleh itu, notis kebankrapan yang telah dikeluarkan di dalam kes ini di atas nama kedua-dua pemohon adalah sah dan petisyen yang dikemukakan setakat itu juga adalah sah (lihat ms 654 D–E).

(2) Di dalam kes ini, terdapat 'penghakiman muktamad' di bawah maksud s 3(1)(i) Akta tersebut. Tidak terdapat keputusan bahawa suatu notis kebankrapan tidak boleh dikeluarkan untuk suatu hutang penghakiman semata-mata kerana penghakiman termasuk kos untuk ditetapkan, dan kos belum ditetapkan lagi. Oleh itu, persoalan penepian berkenaan dengan kos di dalam tuntutan untuk suatu hutang penghakiman tidak timbul (lihat ms 656D–G); *Re GJ; ex p GJ* [1905] 2 KB 678; *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 dan *Re Farrugia; ex p Deputy Commissioner of Taxation* (1988) 80 ALR 651 diikut.]

Notes

For cases on notice of bankruptcy generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1699–1816.

Cases referred to

Farrugia, Re; ex p Deputy Commissioner of Taxation (1988) 80 ALR 651 (folld)
Frank Hill, Re; ex p Holt & Co [1921] 2 KB 831 (folld)
GJ, Re; ex p GJ [1905] 2 KB 678 (folld)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 2 KB 831 (folld)
Michael Chong Ngian Fong v Syarikat Fong Sam Timber & Anor [1977] 1 MLJ 263 (not folld)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Bankruptcy Act 1883 s 4(1)(g) [Eng]
Bankruptcy Rules 1969 Form 4
Interpretation Acts 1948 and 1967 s 2(3), 4(3)
Rules of the High Court 1980 O 42 r 12

Paul Ong (*Paul Ong & Associates*) for the judgment debtor.
PC Neoh (*Suhaimi Khor Zulkifli & Chang*) for the judgment creditor.

Cur Adv Vult

Chin Fook Yen J: This is an appeal from a receiving order and adjudicating order made by the deputy registrar against the debtor on a petition in the names of two persons ('the applicants'). The applicants, as far as I can gather from the record, were the undivided registered owners in equal shares of a piece of land against which the debtor had earlier lodged a caveat. The applicants, as plaintiffs, had together applied successfully for the removal of the caveat. Thereupon, damages were awarded to the applicants against the debtor and were subsequently assessed at RM19,479.14 and costs to be taxed in favour of the applicants in both their names. On the hearing of the appeal before me, counsel for the debtor argued on three grounds, but eventually submitted on two grounds only, abandoning the third ground. They were as follows:

First ground: It was submitted that the bankruptcy notice dated 12 December 1997 was misconceived, in that it was issued in both the applicants' names. As such, it was fatally flawed. It was the contention of the counsel that only one applicant could have applied, not both of them together, for the issue of the bankruptcy notice and therefore, the bankruptcy notice issued in both the applicants' names was invalid. He referred to the case of *Michael Chong Ngian Fong v Syarikat Fong Sam Timber & Anor* [1977] 1 MLJ 263 in support. Among other things, this was what the learned judge said (at p 264E–G):

> But then there was a serious fundamental defect of a different kind in the bankruptcy notice which was issued by the petitioning creditors against the debtor which rendered the notice invalid and of no effect and that defect was that the bankruptcy notice was issued not at the instance of one creditor but two creditors. Under s 3(1)(i) of the Bankruptcy Act 1967, a bankruptcy

> notice may be issued against a debtor at the instance of one and only one creditor on a final judgment or final order. I think there could have been no objection to the bankruptcy notice if it had been issued by only one of the two creditors based on the amount of money due to that creditor in the judgment of 21 April 1975 but the issue of the bankruptcy notice jointly by both the judgment creditors rendered the notice bad and irregular.

A

He continued with his ratio decidendi as follows (at p 264G–I):

B

> The bankruptcy petition which follows after a debtor has committed an act of bankruptcy is on a different footing. The bankruptcy petition unlike the bankruptcy notice may be presented to the court by one or two or more creditors under s 5(1)(a) of the Bankruptcy Act. This section and the form in the appendix to the Bankruptcy Act relating to a creditor's petition provide for the presentation of the petition by one or several creditors while s 3(1)(i) and the forms prescribed for the issue of a bankruptcy notice and the request for the issue of a bankruptcy notice speak of only one creditor. The provisions of ss 3(1)(i) and 5(1)(a) of the Bankruptcy Act, r 91(2) and (3) of the Bankruptcy Rules and the relevant forms prescribed in the appendix to the Act are to be construed literally.

C

D

With the greatest respect, I am unable to agree with his view. To begin with, s 3(1)(i) of the Bankruptcy Act 1967 ('the Act'), no doubt, does mention the words 'a creditor' in singular number. But s 4(3) of the Interpretation Acts 1948 and 1967 ('the Interpretation Acts'), clearly provides that 'words and expressions in the singular include the plural, ...', subject to s 2(3) of the Interpretation Acts. Similarly, the same can be said for Form 4, the request for issue of Bankruptcy Notice as prescribed by the Bankruptcy Rules. Speaking of literal construction, in the instant case, the applicants' registered interest in the land was undivided, to the very cent of it. It will be an absurdity to exclude the application of s 4(3) of the Interpretation Acts that the singular would include the plural. Surely, s 2(3) of the Interpretation Acts is not intended to exclude the application of s 4(3) of the same Acts in the circumstances of the case. That apart, I also find support for my view in the case *Re Frank Hill; ex p Holt & Co* [1921] 2 KB 831. In that case judgment was obtained in the name of a firm of Holt & Co, then consisting of four partners. Subsequently, one of the partners retired. Thereafter, a bankruptcy notice was issued at the request of 'Holt & Co'. At this time, there were only three partners left. The issue decided there was that on the retirement of a partner, the persons entitled to enforce the judgment were still the members of the firm of Holt & Co. The proceedings were considered perfectly regular. It was held that (at p 835):

E

F

G

> The firm of Holt & Co originally consisted of four members and the surviving or continuing partners of the firm were quite at liberty to issue the bankruptcy notice and to present that petition.

H

The issue before me is whether two or more judgment creditors can issue a bankruptcy notice. In that case, the firm of Holt & Co issued the bankruptcy notice. The court there not only did not object to the firm being the applicant, but also in fact decided that the continuing partners were at liberty to have done so. A firm has no legal entity. It is only a conventional

I

A mode of designating the persons composing it. By implication, if, therefore, the partners of a firm can issue a bankruptcy notice, as decided in that case, I am of opinion that the bankruptcy notice issued in the instant case in both the applicants' names is valid and the petition presented to that extent is also valid.

B Second ground: The objection here was that the amount claimed in the bankruptcy notice did not include the costs to be taxed, as well as the interest to which every judgment was entitled to carry pursuant to O 42 r 12 of the Rules of the High Court 1980. It was submitted, therefore, the bankruptcy notice was incomplete. In the event that the judgment creditor wished to forego the other items, the waiver must be clearly stated in order C not to mislead or embarrass or perplex the debtor. There should not be repeated claim subsequently. For ease of reference, the relevant portions of the judgment obtained which was produced in the request for issue of bankruptcy notice and the bankruptcy notice issued are reproduced below. The judgment ordered:

D > Adalah dengan ini dihakimi bahawa defendan membayar plaintif RM19,479.14 *dan kos ditaksirkan.* (Emphasis added.)

And the bankruptcy notice issued herein claimed:

> the sum of RM19,479.14 claimed by them as being the amount due on the judgment obtained by them ... .

E A number of cases had been referred to during the submission on both sides before me. In those cases the claim, inter alia, included interest which was never properly calculated. I find them not helpful. In our case here, the judgment debt given was RM19,479.14 and the bankruptcy notice had claimed the judgment debt alone, without including the statutory interest F and the costs awarded which had still not been taxed. The basic facts here fall squarely with the case of *Re GJ; ex p GJ* [1905] 2 KB 678 (CA), which decision will certainly help to resolve the issues for determination here. In that case, the plaintiff in an action in the King's Bench Division recovered judgment against the defendant for '1500*l and costs to be taxed.*' (Emphasis added.) Before the costs had been taxed, the creditor served on the debtor G a bankruptcy notice claiming payment of 1500*l* alone. At the hearing, it was objected on behalf of the debtor that the bankruptcy notice was bad because it did not require payment in accordance with the terms of the judgment, inasmuch as it required payment of the 1500*l* without mentioning the costs. It was further contented that a creditor could not split a judgment debt into H two and serve a bankruptcy notice in respect of part of the debt, unless he abandoned the other part with clear indication. Lastly, it was submitted that there was not a final judgment until the costs had been taxed. As can be seen above, the grounds argued there were substantially the same before me. We know that to support a bankruptcy notice there must be a final judgment. That apart, it is also essential that at the time of issue of bankruptcy notice, I the creditor must be in a the position to issue execution (see *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 at p 265). In *Re GJ*, Vaughan Williams LJ had this to say about a 'final judgment'.

> What has been held essential to constitute a 'final judgment' within sub-s 1(g) is that there must have been something amounting to a cause of action which has been dealt with on the basis of a cause of action, at any rate to this extent, that the debtor has had the opportunity of setting up a counter-claim, set-off, or cross-demand. And, if the debtor has not had the opportunity of doing that, the judgment or order does not come within the term 'final judgment' as used in sub-s 1(g) of the Bankruptcy Act 1883.

Subsection 1(g) and s 3(1)(i) of our Bankruptcy Act are almost identical. His Lordship emphasized that the words ' final judgment' in the subsection ought to be given their strict and proper meaning, ie (at p 681):

> a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established ... .

In the instant case, the debtor has committed a tort of trespass by caveating the applicants' land. Thus, there was a previously existing liability on his part to the applicants and his liability in respect of that tort was established by the judgment. Under these circumstances, I have no doubt that there was a ' final judgment' within the meaning of s 3(1)(i) of the Act. That being so, the only question now is whether the creditor can issue a bankruptcy notice independently of the costs. His Lordship provided the answer in these words (at p 681):

> If these cases are examined, it will be found that there is no decision that a bankruptcy notice cannot be issued for a judgment debt simply because the judgment includes also costs to be taxed, and the costs have not been taxed.

This case was cited with approval by Mohd Azmi SCJ in the case of *Low Mun* at p 266:

> As regards costs, where a judgment is obtained for a certain sum and costs to be taxed, a bankruptcy notice can be issued for the amount of the judgment without the costs ... . The costs cannot be included or separately relied on until they have been taxed ... .

In view of the statement of law stated above, the question of waiver in respect of the costs in a claim for judgment debt does not arise. Where a bankruptcy notice claimed interest on the judgment debt to a date specified in the notice, but did not in terms waive or abandon any claim for interest accruing after the date so specified, the Full Court of New South Wales in *Re Farrugia, ex p Deputy Commissioner of Taxation* (1988) 80 ALR 651 said at pp 657, 658:

> But if his Lordship meant that a bankruptcy notice must not only make clear what sum is to be paid in compliance with the notice, and that no further payment is required to secure compliance, but must also expressly abandon any future claim (as, for example, by proof of debt in a subsequent bankruptcy) which the terms of the original judgment might enable the creditor to make, we must respectfully disagree. Vaughan Williams and Stirling LJJ laid down no such proposition, and we can see no basis for it in principle.
>
> In our opinion, the bankruptcy notice before us complies with the statutory requirement of s 41(2), namely, that it requires the debtor to pay the

judgment debt in accordance with the judgment. It is true that it does not in terms state that the creditor abandons or waives any claim for interest accruing beyond 26 June 1987, but we see no basis in law for such a requirement.

For the reasons aforesaid, the appeal is dismissed with costs. RO and AO affirmed.

Appeal dismissed with costs.

Reported by Loo Lai Mee